United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-7236

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FOR THE SECOND CIRCUIT

ANNICE GILBERT,

Plaintiff-Appellant-Cross-Appellee,

v.

P/S

CONSOLIDATED FOODS CORPORATION,

Defendant-Appellee-Cross-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF ON CROSS-APPEAL FOR DEFENDANT-APPELLEE-CROSS-APPELLANT

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Introduction

Although her own appeal has been dismissed due to her own neglect, plaintiff devotes a great deal of her answering brief to attacking the District Court's findings which denied her the only relief prayed for in her Complaint, a contractual recovery for disclosure of an idea. In this respect, plaintiff's strategy is obvious. Unable to answer defendant's arguments directly, plaintiff would divert the Court's attentions from the legal issues before it by seeking to create the feeling that plaintiff somehow should have received more from the District Court and that it would be inequitable now to give her even less.

Our intention in this reply brief is to focus again on the specific issues raised on our appeal. However, we most

strenuously disagree with much of plaintiff's "Statement of the Case" which is little more than a reiteration of plaintiff's allegations in the brief presented to and rejected by Judge Lasker when plaintiff moved unsuccessfully to amend the initial decision below.

In the first place, no matter who said what on March 30, 1968, the testimony of numerous independent witnesses and documentary evidence established beyond doubt that Aris had experimented with Lycra spandex well prior to 1968 and, since the mid-1960's, had been interested in developing a Lycra spandex glove which could be promoted as a "Supp-Hose" for the hands, that it had had a Lycra spandex lace glove in its line since 1965, and that it had found the actual Lycra spandex fabric it utilized in the Hands Beautiful glove several months prior to March, 1968. All this is documented in the District Court's decision (13a-15a; 21a-22a; 25a) and stands as a complete bar to any recovery by Mrs. Gilbert for her alleged disclosure.

Moreover, plaintiff's interpretation of the record has been firmly rejected by the District Court based on its observation and assessment "of the credibility of all witnesses". (25a) Such observation included plaintiff's husband, David Gilbert, who had been found to be "totally unworthy of belief" during pretrial testimony in proceedings in which he was held in civil contempt by Judge Frankel and fined $2,394 (Ex. BC, BD, BE)* and whose

* The finding that Mr. Gilbert was "totally unworthy of belief" was made by the Honorable Gregory J. Potter, United States Magistrate, who held evidentiary hearings in the matter. It was confirmed by Judge Frankel who noted that the Magistrate "has been driven to conclude that Gilbert's attorney, like Gilbert himself, had given testimony which could not be believed. This court—both upon the cold record and upon the court's own contacts with this case—is not remotely disposed to question these credibility judgments." (Ex. BE)

evasive responses at trial caused Judge Lasker to admonish him: "Don't get testy in your answers. You don't want another fine." (Tr. 605)

Such observation also included Mrs. Gilbert herself. On cross-examination by defendant, she attempted to explain the significance of her sketch of a "night mitten" (Ex. M) which Mr. Stanton testified had been the only product she had disclosed on March 30. Her response was to testify that the night mitten or night glove had been disclosed earlier than March 30 and when pressed further, she testified repeatedly that she had revealed at the same time, several months prior to March 30, all of the alleged therapeutic and cosmetic benefits which she now claimed as the confidential disclosure on March 30. (3sa-9sa)* Then, after a recess, she returned to the stand and on redirect by her own attorney flatly denied having done so. (10sa) Obviously, during the recess she had been informed that she had damaged her own cause by admitting a voluntary disclosure of her alleged idea and thus changed her testimony to fit her interest.

In his decision, Judge Lasker was gentlemanly. Rather than call the lady a liar, he merely accepted her first version of the facts and accordingly, denied recovery. For our part, we believe that Judge Lasker was too much a gentleman. We submit that because plaintiff had been promised some compensation by defendant, the District Court sought a way to give her some, even though the promise was based on the erroneous assumption that her idea of flattening the veins on the back of the hands would be of value, and even though she was not entitled at law to any recovery. But Mr. Stanton's promises to Mrs. Gilbert and his later monetary offer to her, all related solely to the

* "sa" refers to the supplemental appendix which we submit herewith.

March 30 disclosure of the single idea and had nothing to do with the later "advisory services" which formed the basis of the District Court's decision. Thus, plaintiff's own proposed findings of fact stated:

> "26) Stanton admits that on numerous occasions he reaffirmed to Mrs. Gilbert and her husband the Defendant's obligation *under the agreement to compensate Plaintiff for her idea.*" (16sa; emphasis added).

Moreover, the later specific money offer to her was a settlement offer made to resolve a dispute and to avoid litigation.* It shows that Mr. Stanton followed through on his promise to be fair; and should now be disregarded in its entirety since Mrs. Gilbert rejected the offer (obviously unwisely) and commenced litigation which has now extended for over six years and during which it has been determined as a matter of law that she is not entitled to any recovery for her alleged disclosure on March 30.

Plaintiff's attack on the District Court's denial of recovery to her is not only irrelevant but also inaccurate. For example, despite plaintiff's recitations at page 8 of her brief, there was in fact extensive testimony that Mr. Stanton had flatly rejected the contract drafts which Mrs. Gilbert had prepared in May and October 1968. Mr. Stanton testified that he told Mr. Gilbert that the May document was "idiotic and farcical" and "completely cockeyed" (Tr. 184, 185), and that his comments on the October draft were to the effect that "she was claiming here [in Exhibit 92] areas in which there was no justification . . . that it was

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* At page 5 of her brief, plaintiff alleges a specific amount. We wish to point out that no such figure is in evidence and indeed testimony as to the amount was rejected by the Court which stated: "I would characterize such a proposal probably as a settlement offer, but I will hear the discussion without hearing the figures." (Tr. 210; see also, 17sa)

completely unacceptable to me." (Tr. 187) This was confirmed by Mr. Gilbert himself who testified that Mr. Stanton told him that the May draft was "a big joke, a farce . . . she has no right to license me." (Tr. 554)

Similarly misleading is plaintiff's statement that "Stanton admitted that he 'might have' told a third party that plaintiff had something to do with originating the idea with the glove." (Pl. Br., 9, 15) Mr. Stanton's actual testimony, far from suggesting that Mrs. Gilbert originated the Hands Beautiful glove, was that "I might have told him [the third party] that Mrs. Gilbert gave us an idea for the flattening of the veins in the back of the hands by using a power net." (Tr. 87)

Again, at page 13 of her brief, plaintiff claims that a witness, Mr. Robbins, testified that the first time he knew of Aris' interest in his company's Lycra spandex fabric was "approximately 30 to 60 days prior to October 21, 1968". But in fact, Mr. Robbins testified that it could have been as early as May that he became aware of Aris' interest (Tr. 926-930) and Judge Lasker so characterized his testimony, noting:

> "I understand that he is not absolutely sure. He thinks it could be May. He doubts it to some extent. He knows it was not *later* than thirty to sixty days before October 21st." (Tr. 929, emphasis added).

One additional example of plaintiff's loose treatment of the record. In arguing against the District Court's finding of a voluntary disclosure of ideas by Mrs. Gilbert prior to March 30, plaintiff quotes Mrs. Gilbert as having testified that:

> " 'He said whatever ideas he would utilize he would pay me for them. That was the understanding.' (Tr. L. 473)" (Pl. Br., 17)

But Judge Lasker made such finding and was fully justified in rejecting this testimony because, according to plaintiff's own testimony, she had never in fact been paid for any ideas she may have given Mr. Stanton over the years. (9sa)

In sum, plaintiff's attempt to create sympathy for herself and to divert the Court's attention from the issues before it should be disregarded. We turn now to consideration of the substantive questions raised on this appeal.

POINT I

Plaintiff's "Advisory Services" After March 30, 1968 Were Never At Issue and She Should Not Have Been Granted Recovery Therefor.

One of the principal arguments we advance on this appeal is that the trial of this case involved only the issue of liability for the ideas allegedly disclosed by Mrs. Gilbert to Mr. Stanton on March 30, 1968; that a possible liability for Mrs. Gilbert's "advisory services" after March 30, 1968 was never at issue; and that it was improper to grant her a recovery on a claim that was never viewed by the parties as being at issue and requiring proof.

Plaintiff's treatment of this argument in her brief is largely illusory, if not deceptive. Her principal technique is to suggest that testimony which in fact was directed only to the March 30 disclosure was offered as relevant to the question of Mrs. Gilbert's subsequent advisory services.

A. The Testimony at the Trial on Liability Was Not Directed to a Possible *Quantum Meruit* Recovery.

Plaintiff refers to certain paragraphs in the proposed findings of facts submitted by the parties prior to trial, stating that these proposed findings make it apparent that

the parties were aware of the *quantum meruit* issue. (Pl. Br., 26-27) To the contrary, the proposed findings, in context, document defendant's consistent view that Mrs. Gilbert was seeking only a recovery for her March 30, 1968 disclosures. (19sa-32sa) Thus, the particular paragraphs cited by plaintiff of defendant's proposed findings, Nos. 29 and 30 (27sa), were part of a series of proposed findings of facts which were offered to negate a recovery pursuant to the alleged March 30 contract. Nowhere in defendant's proposals of fact or law is there any reference to a *quantum meruit* recovery for services rendered after March 30.

Plaintiff claims that Mrs. Gilbert's awareness of the Hands Beautiful project after March 30 was in dispute. (Pl. Br., 27) But, as shown in paragraph 28 of defendant's proposed findings (26sa), this was not so, as defendant stated even prior to trial that the social meetings with the Gilberts continued after March 30, that these old friends were "kept informed as to the development of the HANDS BEAUTIFUL glove" and that they "often volunteered comments and suggestions thereon. . ." These facts were never in dispute; but the point we make is they were never conceived as relevant to a *quantum meruit* claim. In this regard, plaintiff's own pretrial proposed findings establish our point. They contain no hint of any such claim. (11sa-18sa) Her proposed conclusions of law read *in toto:*

> "1) The document dated March 30, 1968 is a valid and binding agreement.
>
> "2) A relationship of trust and confidence arose from the agreement of March 30, 1968 with respect to the idea given to Defendant pursuant to the agreement.
>
> "3) Plaintiff having given Defendant an idea which was of value to Defendant, and the Defendant having utilized said idea by manufacturing and selling the

'Hands Beautiful' glove and body suit made from Lycra Spandex, advertising said products to have the capacity to impart cosmetic and therapeutic benefit to the wearer, all in accordance with Plaintiff's idea, without paying to Plaintiff a 'reasonable return' as provided in the agreement. Defendant breached the agreement and violated the relationship of trust and confidence and Defendant is thus liable to the Plaintiff for the reasonable value of her idea.

"4) The parties having agreed that a 'reasonable return' under the agreement was 8% of Defendant's gross sales of products manufactured and sold in accordance with plaintiff's idea, Defendant is liable for that amount." (17sa-18sa)

We submit it is apparent on the record, and not rebutted by plaintiff, that no claim was ever advanced during the trial on liability for the so-called advisory services of Mrs. Gilbert rendered after March 30, and that neither party was ever aware that this was at issue. Indeed, plaintiff's extensive recital of her version of the facts and her displeasure with the decision of the District Court denying her a contractual recovery, emphasize that a major factual issue in the case was the determination of what it was that Mrs. Gilbert had disclosed on March 30, 1968,* and that the testimony as to subsequent events was aimed at shedding light on that issue.

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* The other major factual issue concerned defendant's proof of its earlier and independent development of the product concept, including the particular fabric, and the general promotional concept of a "Supp-Hose" for the hands. The District Court found for defendant in these regards thus negating any right Mrs. Gilbert may have had to relief, no matter what she disclosed on March 30.

B. Defendant Was Prejudiced by the Lack of Notice.

Given this lack of awareness of any potential liability in *quantum meruit,* the critical question is whether as a matter of law there was prejudice to defendant requiring reversal of the judgment below. Plaintiff's argument on this point is sparse, but specious.

Plaintiff argues that even if Mr. Stanton had been asked whether he intended to pay for Mrs. Gilbert's post-March 30 services and had answered negatively, "this clearly would not have changed the result" (Pl. Br., 28), since the District Court's conclusion "would clearly not have been altered by any self-serving statement made by Stanton" (Pl. Br., 29). Perhaps such testimony would not have changed the result, but the fact is that defendant never had the chance to offer it, and we can only guess now as to the effect it would have had.

Moreover, such testimony would not have been limited to a mere "yes" or "no" response from Mr. Stanton. Had the issue been raised, there would have been a far more comprehensive and specific treatment of the time spent with Mrs. Gilbert after March 30 and of the circumstances and understandings surrounding these meetings. This would have involved not only the testimony of Mr. Stanton, but also far more extensive cross-examination of Mr. and Mrs. Gilbert themselves.

We respectfully submit that under such circumstances, it would have become abundantly clear that Mr. Stanton continued his contacts with the Gilberts on a friendly basis only, as they had been for years; that his promise to pay her something related only to the one advertising suggestion she had made on March 30 that he had liked; and that it would strain belief in the extreme to suggest that when he took the Gilberts to dinner and incidentally discussed his

business with them as he had over the years,* that he would, in addition to the cost of dinner, be charged with a bill for services in the amount of $12,000.

Since defendant was never given the opportunity in pre-trial discovery or at trial to explore these facts which ultimately formed the sole basis for liability, the prejudice to it is apparent and substantial.

Plaintiff's suggestion that there was an opportunity to cure this at the damage hearing (Pl. Br., 30), is frivolous. The time for such evidence to have been presented was at the hearing on liability, at which time defendant was unaware of the issue. By the time of the damage hearing it was too late and it would have been improper then to seek to relitigate the issue of liability. The comment Judge Lasker made at the damage hearing (222a-223a) which plaintiff quotes (Pl. Br., 30), was directed to the opportunity for proof of specific contributions claimed to have been made by Mrs. Gilbert as elements of damages (217a-220a), not to an opportunity to relitigate the right to recovery.

In this connection, plaintiff is correct that we raise the issue of prejudice for the first time on this appeal. That is because we had no opportunity to do so below since we were never on notice until after the decision on liability that the District Court intended to make an amendment of the pleadings. Under these circumstances, we were not required to make a motion to the District Court pursuant to Rule 52(b), Fed.R.Civ.P., but are entitled to raise this issue on appeal.

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* Mrs. Gilbert herself testified that it was customary on all social occasions with Mr. Stanton, even prior to March 30, 1968, for him to discuss business, as indeed "He never spoke of anything else but his business." (1sa-2sa). As the District Court found, although she often gave him suggestions during these social meetings she was never paid for her advice. (11a)

Three other arguments made by plaintiff remain for disposal. First, the cases she cited for the proposition that there may be a *quantum meruit* recovery on a failed contract (Pl. Br., 23-24) are beside the point. At bar, the recovery was granted for services which were not the subject of the failed contract and the issue is not whether she might have had a claim in *quantum meruit* for services rendered, but whether such a claim was at issue and, if so, was proved. None of the cases cited by plaintiff substituted a recovery in *quantum meruit* for services which were not the subject of the unenforceable contract.*

Second, plaintiff's argument (Pl. Br., 24-25) that the relief awarded was appropriate under Rule 54(c), Fed.R. Civ.P., is flatly wrong. Rule 54(c) relates to prayers for relief and allows liberal interpretation thereof, but it does not cure a failure to plead the facts underlying a claim and thus give the required notice under Rule 15(b). At best, had there been appropriate notice of the *quantum meruit* claim, Rule 54(c) might have allowed recovery despite the fact that plaintiff did not pray for it in her Complaint. (39a)

Third, plaintiff's statement that the award was proper under Rule 15(b), Fed.R.Civ.P., (Pl. Br., 25-26) is incorrect since it is based on the erroneous assumption that the *quantum meruit* issue was tried by the "expressed and implied consent" of the parties. Plaintiff's statement that

> "the parties litigated . . . the question as to whether the parties expected, understood and agreed that Mrs. Gilbert was to be compensated for business sugges-

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* *Black* v. *Fisher*, 145 N.Y.S. 2d 143 (Sup. Ct., Bronx Co. 1955) emphasizes defendant's point. There, plaintiff's suit on a contract had been dismissed and he sued again seeking to recover in *quantum meruit* for services which were related to but slightly different from those called for by the contract. Obviously, in the second suit, defendant was on notice as to the nature of the claim.

> tions that she gave relative to the Hands Beautiful glove, as well as the question of the extent and value of the services rendered by Mrs. Gilbert" (Pl. Br., 25-26)

is correct only as it applies to the suggestions made by Mrs. Gilbert on March 30, 1968. As to those issues, the District Court found in defendant's favor and denied recovery to plaintiff. However, there was never an understanding by either party that there was a separate claim for later services.

On this record, the judgment below should be reversed and the Complaint dismissed.

POINT II

The Amount of the Award is Not Supported by the Record and Should be Reversed.

Plaintiff's treatment of the amount of the award supports and indeed documents our point that the District Court's opinion on damages fails to justify the award of $12,000. We note that plaintiff's recitation of particular items which it alleges would justify the award (Pl. Br., 31-33) are not included in the District Court's opinion as elements which formed the basis of the award granted.

As a result, we are left in the dark as to how the District Court arrived at the $12,000 figure. In our main brief at pages 20-23 we showed that the vague elements cited by the District Court were in fact not supported by the record. Such items as the ready availability of Mrs. Gilbert which was apparently an important factor to the District Court (32a-35a) are not even supported in plaintiff's laundry list. That is because there was no such testimony. Even if there

had been, such factor should have been given its true value and treated as overtime work subject to compensation at 1½ or 2 times a normal hourly rate minus, of course, the value of the free dinners and social companionship Mrs. Gilbert received for such arduous duty.

Plaintiff's attempts to fill the gaps in the opinion below are mere speculation, if not plainly inaccurate. The reference to Mrs. Gilbert's advice "that fabric samples which had been sent to her for her opinion were too thin and would not make a proper glove . . ." (Pl. Br., 31-32) is clearly inapposite. Such advice could not have constituted part of the basis of recovery since Judge Lasker found as a matter of fact that defendant had secured the exact fabric utilized in the Hands Beautiful glove prior to March 30, 1968 (14a-16a; 21a). The reference to Mrs. Gilbert's advice to starch the fabric to eliminate the curl or as to the construction of the gloves (Pl. Br., 32) is similarly misplaced since the testimony was that these ideas were not utilized by Aris (217a) and Judge Lasker made no finding to the contrary.

The same may be said as to the allegation that Mrs. Gilbert conceived the product names, Hands Beautiful and Isotoner. (Pl. Br., 33). The District Court did find that both Mr. and Mrs. Gilbert had suggested various product names (17a-18a) but Mr. Stanton testified that he had come up with the names which were used (Tr. 160-161). Judge Lasker made no finding on this point, having specifically ruled that there was no claim for compensation for the names (108a), a ruling to which plaintiff's counsel specifically acquiesced. (109a) It ill-behooves plaintiff now to suggest that this should be an item underlying the award.

Plaintiff's attempts to resurrect the testimony of her expert witnesses (Pl. Br., 34-35) are futile. Since the District Court rejected their testimony, it could not have

formed any part of the basis of the award and cannot now be utilized to explain that award.

We are left, then, with an award which has been fashioned by the District Court, not on the basis of the record before it, but out of a desire to give something to a plaintiff who had had great expectations, without basis in law. But it is not the role of the courts to soothe hurt feelings in the absence of legal liability, especially not in this case where the plaintiff's recollection of her actual contribution was clearly influenced and expanded by the prospect of great rewards.

CONCLUSION

For the reasons stated above, and in our main brief, we submit that the judgment below should be reversed with instructions to enter judgment in favor of defendant.

Respectfully submitted,

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Service of 2 copies of this within
Brief is admitted this
30 day of November 1976

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